



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2003

Ms. Sunny Y. Lin
Henslee, Fowler, Hepworth & Schwartz, L.L.P.
3200 S.W. Freeway, Suite 2300
Houston, Texas 77027

OR2003-7742

Dear Ms. Lin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190175.

The Bryan Independent School District (the "district"), which you represent, received a request for a "copy of all materials and information inside the white and black binders used in the Level 4 Grievance Hearing" brought by a named individual. You assert that portions of the requested information are not subject to chapter 552 of the Government Code. You also argue that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.114 and 552.117 of the Government Code, and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. We have considered the exceptions you claim and reviewed the submitted information.

We first address the district's contention that portions of the submitted information are not subject to the Public Information Act (the "Act"), chapter 552 of the Government Code. The Act applies to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act defines "public information" as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Likewise, the Act is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. *See* Gov't Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by consultant if information relates to governmental body's official duties or business, consultant acts as agent of governmental body in collecting information, and governmental body has or is entitled to access to information). However, the Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989).

You assert that the portions of the submitted information are not subject to the Act because they are not school or educational records and they were not created by the district. After reviewing the documents at issue, we find that they are maintained by the district in connection with the transaction of official business, namely, an employee grievance hearing. For this reason, we conclude that the submitted information is "public information" under the Act. Because we conclude that the submitted information is subject to the Act, we will address your arguments against the required public disclosure of the information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* The submitted information contains both evaluations and references to evaluations. References to or characterizations of evaluations are not confidential under section 21.355. Accordingly, we find that only the evaluations themselves are confidential under section 21.355, and must be withheld. We have marked the information that must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code.

Additionally, section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" (Emphasis added.) Thus, such information

cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). You state that exhibits B-3 and C-12 are transcripts of grievance hearings that took place in closed meetings. If exhibits B-3 and C-12 are transcripts of meetings of the district's board of trustees that were closed pursuant to the Open Meetings Act, chapter 551 of the Government Code, then we agree that the district must withhold the transcripts from disclosure under section 552.101 in conjunction with section 551.104(c) of the Government Code.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if: (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person; and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. You argue portions of the submitted information should be excepted under common law privacy. After careful review, we do not find any information of the type intended to be protected by the *Industrial Foundation* court. Consequently, the district may not withhold any information under common law privacy pursuant to section 552.101.¹

You also argue that portions of the submitted information must be withheld under FERPA, which provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. *See* Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

¹ You reference "irrelevant and unfounded" allegations about district employees. However, the Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). In addition, in Open Records Decision No. 579, the attorney general determined that the statutory predecessor to section 552.101 did not incorporate the common law tort of false-light privacy, overruling prior decisions to the contrary. Open Records Decision No. 579 at 3-8 (1990). Thus, the truth or falsity of information is not relevant under the Public Information Act.

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions; and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the information that tends to reveal information about a student and must be withheld pursuant to FERPA.

The district also raises section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024.² Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We note that information regarding former family members is not excepted from disclosure under section 552.117. We have marked the information that is excepted under section 552.117 if the employees timely elected under section 552.024 to protect this information.

In summary, the district must withhold the marked evaluations under section 21.355 of the Education Code. Exhibits B-3 and C-12 must be withheld in their entirety pursuant to section 551.104(c) of the Government Code, if they are transcripts of closed meetings of the district's board of trustees. The district must also withhold the marked information under

² In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. *See* Act of May 30, 2003, 78th Leg., R.S., ch. 947, 2003 Tex. Sess. Law Serv. 2822 (Vernon) (to be codified as an amendment to Gov't Code § 552.117).

FERPA. Lastly, information excepted from disclosure under section 552.117 of the Government Code must be withheld. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather R. Rutland". The signature is fluid and cursive, with the first name being the most prominent.

Heather R. Rutland
Assistant Attorney General
Open Records Division

HRR/sdk

Ref: ID# 190175

Enc: Submitted documents

c: Mr. Chris Ferrell
The Bryan-College Station Eagle
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(w/o enclosures)